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No. 07-977

In the Supreme Court of the United States

LAWRENCE E. WARNER AND GEORGE H. RYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' due process rights to a fair and impartial jury were violated when the district court dismissed two deliberating jurors solely on the ground that they misrepresented their criminal background during voir dire and were not forthcoming during the district court's subsequent inquiry, and then substituted jurors in compliance with Federal Rule of Criminal Procedure 24(c)(3).

2. Whether the district court's interviews of jurors, some of which were at petitioners' request, constituted structural error.

3. Whether the court of appeals erred by failing to consider the cumulative effect of problems arising during jury deliberations when the court found only one harmless error and petitioners did not argue on appeal that the alleged errors had a cumulative, prejudicial effect.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-91a) is reported at 498 F.3d 666. The opinion of the district court (Pet. App. 108a-243a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2007. A petition for rehearing was denied on October 25, 2007 (Pet. App. 92a-93a). The petition for a writ of certiorari was filed on January 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners

were convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d), and multiple counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner George Ryan was also convicted of three counts of making material false statements in a matter within the jurisdiction of the Federal Bureau of Investigation, in violation of 18 U.S.C. 1001; obstructing and impeding the Internal Revenue Service, in violation of 26 U.S.C. 7212; and four counts of filing false tax returns, in violation of 26 U.S.C. 7206. Petitioner Lawrence Warner was additionally convicted of attempted extortion, in violation of 18 U.S.C. 1951; two counts of money laundering, in violation of 18 U.S.C. 1956; and structuring a financial transaction, in violation of 31 U.S.C. 5324. Ryan was sentenced to 78 months of imprisonment and Warner was sentenced to 41 months of imprisonment, both to be followed by one year of supervised release. See Gov't C.A. Br. 2; Ryan J. 2; Warner J. 3. The court of appeals affirmed. Pet. App. 1a-68a.

1. Ryan was elected as Illinois Secretary of State in November 1990 and was re-elected in 1994. Warner was Ryan's close friend and unpaid advisor. As Secretary of State, Ryan was responsible for awarding contracts, following competitive bidding, and granting leases, following the staff's review of alternative sites. Ryan circumvented the process by steering contracts and leases to friends and associates, including Warner, from whom he received financial benefits. As a result of the scheme, petitioners received hundreds of thousands of dollars in benefits, including financial support for Ryan's successful 1998 campaign for governor of Illinois. Pet. App. 3a-4a.

2. Before jury selection, prospective jurors completed a 110-question, 33-page form, which covered,

among many other topics, their criminal and litigation histories. Counsel, as well as the court, questioned the prospective jurors. The district court ultimately seated 12 jurors and eight alternates. Pet. App. 4a; Gov't C.A. Br. 21.

On March 13, 2006, following the six-month trial, the jury began deliberations. On March 20, Juror Ezell sent the court a note, also signed by the foreperson, complaining that other jurors were calling her derogatory names and shouting profanities. After conferring with counsel, the court instructed the jury to treat one another "with dignity and respect." Pet. App. 5a-6a. Two days later, Juror Losacco sent the court a note, signed by seven other jurors, asking if Ezell could be excused because she refused to engage in meaningful discourse and was physically aggressive. The court again conferred with counsel and observed that "[Losacco] has not told us anything about the way the jury stands on the merits. She really has not." *Id.* at 6a. Defense counsel did not assert otherwise. The next morning, the court responded by note, instructing the jury that "[y]ou twelve are the jurors selected to decide this case," and should treat each other with dignity and respect. *Ibid.*

Shortly after instructing the jury, the district court learned that the Chicago Tribune had reported that one of the jurors had responded untruthfully about his criminal background in the questionnaire. Following Warner's counsel's suggestion, the court asked the government to investigate Juror Pavlick's criminal history. The background check confirmed that Pavlick had an undisclosed felony DUI conviction and misdemeanor reckless conduct conviction. The court questioned Pavlick and granted Warner's motion to dismiss Pavlick from the jury. Neither the government nor counsel for

Ryan objected to the motion or the court's ruling. Pet. App. 6a; Gov't C.A. Br. 23-24.

Background checks on other jurors, all conducted either without objection or at petitioners' request, also revealed undisclosed information. Ezell had seven criminal arrests, including charges of possessing cocaine with intent to deliver, assault, battery, and disorderly conduct, and she had used a false name in connection with one of those arrests. She also had an outstanding warrant for driving on a suspended license. The government told the court that, had it known that Ezell provided false booking information, it would have moved to excuse her for cause because Ryan was also charged with providing false information to law enforcement officers. The court questioned Ezell, who acknowledged her untruthfulness but was not completely forthcoming. Pet. App. 6a-7a; Gov't C.A. Br. 24-27.

In deciding whether to dismiss a juror, the district court stated that it would adopt the standard established in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), which required the court to determine whether the juror gave "an untruthful answer to one of the questions on the juror form," and "if so, would a correct answer to that question have provided a valid basis for a challenge for cause." Gov't C.A. Br. 29. Applying that standard, the district court concluded that Ezell "concealed and withheld a great deal of information," and that, had she responded honestly, she would have been dismissed for cause. *Id.* at 27, 29. Warner's counsel agreed. *Id.* at 27. Ryan's counsel initially took no position, but subsequently objected to application of the *McDonough* standard. Nonetheless, he agreed that Ezell should be dismissed under the lower standard for

dismissal that he proposed. Pet. App. 6a-7a; Gov't C.A. Br. 27-28.

Two other jurors were interviewed, at petitioners' request, after the parties learned that they had failed to disclose bankruptcy filings from the mid-1990s in response to the question about whether they had ever appeared in court or been involved in a lawsuit. Both stated that they did not believe that the questionnaire called for their listing the bankruptcy filings and petitioners did not move to dismiss them. See Pet. App. 7a-8a.

Petitioners sought to dismiss other jurors on the ground that they had lied on their questionnaires. For example, Juror Svymbersky, an alternate, had failed to disclose that he stole a bicycle at age 18 or 19 in 1983 and thought that the charge had been expunged. Juror Rein had been arrested for slapping his sister, but had never appeared in court, and Juror Casino had forgotten that he had been arrested 40 years earlier when he was in his early 20s. Following additional questioning of Casino and Svymbersky, the court credited their testimony, as well as that of Rein, that they had not recalled the incidents when completing their questionnaires and declined to dismiss them. Pet. App. 7a-8a.

In light of the dismissals of the two sitting jurors, the court seated alternates Svymbersky and Juror DiMartino. In accordance with Federal Rule of Criminal Procedure 24(c)(3), the court questioned them to ensure that they had no discussions or exposure to publicity about the case, and both satisfied the court that they had not. The court also instructed the jury that it must restart its deliberations. It questioned the remaining original jurors individually to make sure that each understood the need to deliberate anew and was capable of

doing so. The court then reread its entire charge to the reconstituted jury. It additionally instructed the jury that it should not consider the court's questioning of them or the fact that two jurors were excused, emphasizing that the inquiry resulted from the media and not from the lawyers in the case. Pet. App. 8a-9a; Gov't C.A. Br. 35-36.

The reconstituted jury deliberated for ten days, during which time it requested guidance on a matter that the original jury had not sought. It convicted petitioners on all counts. Pet. App. 9a, 37a.

After the verdict, Ezell publicly criticized the jury and the verdict. Among other complaints, Ezell alleged that Juror Peterson brought into the jury room extraneous information about removing a juror for cause. The court granted defense counsel's motion for an inquiry, and it interviewed both Ezell and Peterson. Peterson acknowledged that she brought into the jury room a two-page article by the American Judicature Society (AJS) about substituting alternate jurors and a handwritten note of her own thoughts about a juror's duty to deliberate. Pet. App. 9a-10a; Gov't C.A. Br. 53-55. The district court denied petitioners' motions for a new trial, concluding that Peterson made "a really innocent mistake," and that "this episode did not prejudice the outcome." Gov't C.A. Br. 56.

3. The court of appeals affirmed. Pet. App. 1a-68a.

a. At the outset, the court of appeals noted that petitioners did not argue on appeal that the problems with the jury had a cumulative, prejudicial effect, Pet. App. 3a, or that any juror issues constituted structural error, *id.* at 66a. Nor, the court explained, did petitioners claim that the evidence was insufficient to support any of the charges on which they were convicted. *Id.* at 3a.

While petitioners raised numerous other objections, the court observed that "the district court handled most problems that arose in an acceptable manner, and * * * whatever error remained was harmless." *Ibid.*

In particular, the court of appeals held that the district court did not abuse its discretion when it ordered substitutions of Ezell and Pavlick after eight days of deliberations. The court determined that the district court had applied the correct legal standard, established by this Court in *McDonough*, when it considered whether to dismiss jurors based on their responses during voir dire, and that it consistently applied that standard in its rulings. Pet. App. 24a-30a.

The court of appeals also found no support in the record for petitioners' claim that Ezell was dismissed because of her pro-defense views of the evidence. Even if the prosecution suspected that Ezell was a "defense holdout," and the court did not credit that defense assertion, the court of appeals stated that "[s]o long as the court was not hoodwinked into believing there was cause where there was none (and it was not), the removal was proper." Pet. App. 30a, 31a. Nor did the court find support in the record that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations," especially in light of the district court's instructions to the jury. *Id.* at 32a (quoting Pet. C.A. Br.). Similarly, the court rejected petitioners' claim that the background checks of the jurors prejudiced the defense by fostering a pro-government bias as a result of the jurors' exposure to criminal liability. The court explained that, not only did petitioners request many of the checks, but the district court's instructions "precluded any bias against the defense by preventing the jurors

from knowing about the extent of the background checks." *Ibid.*

The court of appeals next considered petitioners' contention that the replacement of the jurors after eight days of deliberation deprived them of their right to a fair trial and an impartial jury. That argument, the court noted, was without merit in light of the 1999 amendment to Federal Rule of Criminal Procedure 24(c), which explicitly authorizes the replacement of deliberating jurors with alternates so long as the alternates have not discussed the case before replacing an original juror and the jury is instructed to restart deliberations. The court further observed that the reconstituted jury deliberated for ten days and requested additional instructions on matters that the original jury had not sought. Pet. App. 33a-38a.

b. Judge Kanne dissented. Pet. App. 69a-91a. He would have reversed the convictions and remanded for a new trial based on two arguments that petitioners had not raised on appeal: that jurors' conflicts of interest created structural error, and that the cumulative effect of multiple errors in jury management and jury deliberation produced an unfair trial. Judge Kanne opined that "there is a structural error because of the jurors' irreconcilable conflicts of interest that resulted from the jury questionnaire situation" and that "the multiple errors regarding jury management generally and jury deliberation, when viewed collectively, were so corruptive that the verdicts cannot stand." *Id.* at 72a.

c. The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 92a-93a. Judges Posner, Kanne, and Williams dissented. Although they agreed that the "evidence of [petitioners'] guilt was overwhelming," they stated, for the reasons in Judge Kan-

ne's dissent from the panel decision, that the trial did not meet minimum standards of procedural justice. *Id.* at 96a.

4. In this Court, petitioners filed an emergency application for bail pending certiorari. After requesting a response from the government, Justice Stevens denied the application.

ARGUMENT

1. Petitioners first contend (Pet. 11-16) that the district court erred by removing and substituting jurors after deliberations began. That contention lacks merit, was partially forfeited, and does not warrant this Court's review.

a. The substitution was authorized by Federal Rule of Criminal Procedure 24(c)(3), which authorizes replacement of a juror by an alternate "after the jury retires to deliberate," and specifies that, "[i]f an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." As the court of appeals explained, the district court correctly determined that two jurors and one alternate—Pavlick, Ezell, and Masri—should be dismissed because they deliberately withheld information that would have provided grounds for their dismissal for cause. Pet. App. 25a-29a. For example, in connection with one of Ezell's seven undisclosed arrests, she gave false information to law enforcement authorities (C.A. App. 463-464, 506)—conduct similar to a charge against Ryan.

There was nothing wrong with the removal of those jurors. Indeed, petitioners did not object to dismissing Ezell, Pavlick, or Masri (other than as to the legal standard employed by the district court)—and thereby for-

feited that objection. Pet. App. 6a, 7a, 8a; see pp. 4-5, *supra.*

In addition, the court of appeals found no basis in the record for concerns that Ezell's removal "potentially chilled the expression of pro-defense jurors in deliberations," or "that the district court dismissed Ezell because of her view of the evidence or that the prosecution tricked the district court into dismissing Ezell for cause based on its belief about Ezell's view of the evidence." Pet. App. 31a-32a. Rather, Ezell's views were unknown to the litigants and court at that time, and petitioners never argued otherwise when she was dismissed. C.A. App. 411, 534. The jury was instructed that "the circumstances that brought about the fact that these two jurors were excused * * * were not prompted by * * * your previous deliberations." *Id.* at 590.

Nor is there any other indication that the substitution was improper. Before allowing the reconstituted jury to begin deliberations, the district court ensured that the two new jurors had not discussed the case and had not been exposed to prejudicial media coverage, and that each of the remaining original jurors was capable of deliberating anew and disregarding what had gone before. C.A. App. 523-524, 579-584. Moreover, the court reread its instructions to the jury and removed from the jury room all items from the previous deliberations. Gov't C.A. Br. 34, 48. The reconstituted jury deliberated for ten days, and before returning a verdict, the jury asked for information that was not requested by the original jury. See Pet. App. 37a. As the district court found, the jurors who deliberated to judgment were "diligent and impartial" and "made every effort to be fair, even amid extraordinary public scrutiny." C.A. App. 84. This Court does not review the concurrent fac-

tual findings of two courts below "in the absence of a very obvious and exceptional showing of error," *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996), which is not the case here.

b. Petitioners misconstrue (Pet. 13) the court of appeals' opinion as holding that, so long as a court adheres to Rule 24(c)(3), "a violation of the Constitution" is "authorized." The court said no such thing. Instead, it rejected petitioners' contention that "almost any decision to substitute [during deliberations is] prejudicial," Pet. App. 38a, and determined that the substitutions were appropriate on the facts of this case. Nor have petitioners cited any case that stands for the proposition that a defendant's Fifth and Sixth Amendment rights are violated when a district court dismisses jurors based on their intentional and material misrepresentations during voir dire and the record unequivocally establishes that the jurors' view of the evidence played no role in those dismissals. Indeed, petitioners' suggestion (Pet. 24) that Ezell was dismissed because of her pro-defense viewpoint is refuted by their agreement that she, as well as Pavlick, should be dismissed for lying on the juror questionnaires. Pet. App. 6a, 7a. And, notwithstanding petitioners' claim (Pet. 12) that this case is unprecedented in "American jurisprudence," two circuits have recently reviewed high-profile cases involving juror replacement and, deferring to the trial courts, upheld the verdicts reached by reconstituted juries. *United States* v. *Kemp*, 500 F.3d 257, 301-306 (3d Cir. 2007), cert. denied, 128 S. Ct. 1329 (2008); *United States* v. *Ronda*, 455 F.3d 1273, 1296-1301 (11th Cir. 2006), cert. denied, 127 S. Ct. 1327, and 127 S. Ct. 1338 (2007).

c. Nor does this case implicate a circuit split. Ordinarily, "the presiding judge can make appropriate find-

ings and establish whether a juror is biased or otherwise unable to serve without delving into the reasons underlying the juror's views on the merits of the case." *United States* v. *Thomas*, 116 F.3d 606, 621 (2d Cir. 1997). In such cases, including this one, the courts of appeals review a juror's dismissal under the good-cause standard of Federal Rule of Criminal Procedure 23(b)(3) for abuse of discretion. See, *e.g.*, *United States* v. *Ginyard*, 444 F.3d 648, 651-652 (D.C. Cir. 2006) (district court's decision to dismiss juror for job-related reasons reviewed for abuse of discretion); *United States* v. *Edwards*, 303 F.3d 606, 631 (5th Cir. 2002) (district court's decision to dismiss juror based on his dishonesty in answering court's inquiry and bringing extraneous material into jury room reviewed for abuse of discretion), cert. denied, 537 U.S. 1192 (2003); *United States* v. *Gibson*, 135 F.3d 257, 259 (2d Cir. 1998) (district court's decision to remove juror because of claim of illness reviewed for abuse of discretion).

Some courts have applied a heightened standard in cases in which a juror refuses to deliberate, or advocates jury nullification, because of the risk that the requested dismissal is based on the juror's view of the evidence. Under those circumstances, courts have held that a juror may not be dismissed if there is a (reasonable) possibility that the requested removal is based on the juror's views on the merits of the case. See *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *Thomas*, 116 F.3d at 622; *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). See also *United States* v. *Abbell*, 271 F.3d 1286, 1302 & n.14 (11th Cir. 2001) (using term "substantial" possibility, but emphasizing that it was applying the same standard as *Brown*), cert. denied, 537 U.S. 813 (2002). As the Fifth Circuit explained

in *Edwards*, however, the holdings of those cases do not extend to situations, such as this one, where the basis for removal does not implicate the jury's deliberative process:

> *Brown*, *Thomas* and *Symington* stand for the limited proposition that a court may not dismiss a juror based upon its conclusion that the juror is failing to participate in the deliberative process in accordance with law unless there is no possibility that the juror's problem stems from his view of the sufficiency of the evidence. Even at its broadest, the reasoning of these cases extends only to those dismissals where the juror's conduct cannot be evaluated without delving into the reasons underlying the jurors' views of the case, *i.e.*, where the deliberative process has been implicated.

303 F.3d at 633. See also *United States* v. *Vartanian*, 476 F.3d 1095, 1098-1099 (9th Cir.) (reviewing dismissal based on juror's lack of candor about her contacts with the defendant's family for abuse of discretion and distinguishing *Symington* on ground that dismissal was not based on juror's willingness to deliberate or her views on the case), cert. denied, 128 S. Ct. 323 (2007); *United States* v. *Carson*, 455 F.3d 336, 352 (D.C. Cir. 2006) (reviewing dismissal of juror based on his mental health problems for abuse of discretion and distinguishing *Brown* on the ground that dismissal had "nothing to do with the juror's view of the case"), cert. denied, 127 S. Ct. 1351 (2007).

This case does not trigger the heightened standard because the district court dismissed the jurors because they had lied in their questionnaires—an inquiry that was unrelated to the jurors' views of the evidence. In-

deed, even if the heightened standard applied, petitioners would not benefit because the record establishes that there was no possibility that the dismissal (to which petitioners did not object) was based on the jurors' (unknown) views of the evidence. Instead, as discussed above, it was based on their dishonesty during voir dire.

Petitioners' assertion (Pet. 15-16) of a conflict on the standards governing substitution is similarly unsupported. As the court of appeals recognized, the cases on which petitioners rely pre-date the 1999 amendment to Rule 24. Pet. App. 35a. Under that prior version of the Rule, juror substitution during deliberations violated Rule 24(c), and the courts were required to determine, under a harmless-error analysis, whether a defendant was prejudiced by the substitution. *Ibid.* Those cases say nothing about the standard of review following the change in the Rule, which permits substitution.

In any event, there was no conflict before the rule change. Petitioners claim (Pet. 15-16) that *United States* v. *Register*, 182 F.3d 820 (11th Cir. 1999), cert. denied, 530 U.S. 1250 (2000), conflicts with *United States* v. *Josefik*, 753 F.2d 585 (7th Cir.), cert. denied, 471 U.S. 1055 (1985), but the two cases are in harmony. In *Register*, the Eleventh Circuit held that the substitution of an alternate for a deliberating juror requires reversal "only where there is a reasonable possibility that the district court's violation * * * *actually* prejudiced [the defendant] by affecting the jury's *final verdict*." 182 F.3d at 842. The Seventh Circuit in *Josefik* adopted a similar rule: "only prejudicial violations of the rule are reversible errors." 753 F.2d at 587. Thus, the two cases do not conflict.

2. Petitioners also contend (Pet. 16-22) that the district court's interviews of some of the jurors about their

responses during voir dire constituted structural error requiring automatic reversal. Petitioners did not preserve that claim below and, in any event, it is without merit.

Petitioners themselves insisted on much of the questioning. As the court of appeals explained, "many of the investigations were done at the request of the defense." Pet. App. 66a. For example, Jurors Gomilla and Talbot were questioned about bankruptcy filings they made ten and 11 years earlier, which the defense had discovered by combing court records over the weekend. Petitioners insisted on those inquiries, over the government's objection, even though the only voir dire question that arguably called for such information appeared under the heading "Criminal Justice Experience." See C.A. App. 481, 487, 493. Petitioners ultimately declined to move to dismiss Gomilla or Talbot. *Id.* at 518. As the court of appeals explained, petitioners "cannot embed a ground of automatic reversal into a case" by insisting on questioning jurors and then arguing that the questioning they demanded requires automatic reversal. Pet. App. 66a. Nor did petitioners argue below that the questioning constituted structural error. See *id.* at 67a, 72a.

Moreover, there was no error, much less structural error, in the questioning. As the court of appeals recognized, Pet. App. 66a-67a, this Court's decision in *Remmer* v. *United States*, 347 U.S. 227 (1954) (*Remmer I*), disposes of petitioners' structural error argument by holding that even interrogation of a deliberating juror by law-enforcement officers about an extraneous contact is subject to harmless error analysis (as opposed to automatic reversal). *Id.* at 228-230 (remanding for determination whether extraneous influence was harmless). By requiring an inquiry into prejudice, *Remmer I* makes

clear that questioning of a juror does not per se prevent his continued service as a juror.[1]

Petitioners point out (Pet. 18) that, in *Remmer* v. *United States*, 350 U.S. 377 (1956) (*Remmer II*), this Court ordered a new trial "even over the lower court's finding of no prejudice." But the Court reversed in *Remmer II* not on the ground that prejudice was irrelevant, but instead because the district court had undertaken an "unduly restrictive" inquiry into whether prejudice had resulted in that case. *Id.* at 382. This Court then held that "on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident," the defendant had established prejudice and was entitled to a new trial. *Ibid.* Thus, neither *Remmer I* nor *Remmer II* treated law-enforcement questioning of jurors as structural error; instead, they rested on whether the defendant had actually been prejudiced. See also *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.").

The proceedings below demonstrate that courts can evaluate, on a case-by-case basis, the prejudicial effect of questioning of jurors. As the court of appeals explained, the district court "took every possible step to ensure that the jury was and remained impartial, and, through credibility findings and findings of fact, con-

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[1] Petitioners discount *Remmer I*'s prejudice requirement by observing that it was decided before "'structural error' came into this Court's lexicon." Pet. 18. But this Court has never retreated from *Remmer I*'s holding. See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 738 (1993) (citing *Remmer I*, 347 U.S. at 227, in support of the proposition that "[w]e generally have analyzed outside intrusions upon the jury for prejudicial impact").

cluded that this one was." Pet. App. 68a. The court of appeals correctly deferred to the district court's first-hand assessment of the jury: "[T]he jurors who deliberated to verdict in this case were diligent and impartial . . . . They sat attentively through nearly six months of evidence . . . . The court believes these jurors made every effort to be fair, even amid extraordinary public scrutiny." *Id.* at 22a (quoting district court's findings).

Petitioners' factbound challenge to those findings does not merit this Court's review, and is wrong in any event. When questioning jurors, the district court took pains to ensure that the questioning would not affect a juror's ability to be fair and impartial. See, *e.g.*, C.A. App. 524, 578 (assuring Svymbersky that questioning was "generated by media, not by anybody in here," and receiving Svymbersky's assurance that the questioning would have "no bearing over [his] judgment in this trial"); *id.* at 548 (receiving assurance from Rein that questions did not make him feel that he had to please the court or to "please one side or please the other in connection with your deliberations"); *id.* at 551, 575 (receiving assurance that Casino could be fair). The district court also explained to the reconstituted jury that the questioning and the dismissal of two jurors was "not prompted by any of the lawyers or by the parties in this case, nor by your previous deliberations, those of you who were here. Rather, the inquiry was generated by members of the media. It is not related to the lawyers in this case. * * * [N]one of my questions should be considered in any way as you deliberate." *Id.* at 590.

Moreover, the conduct of the reconstituted jury demonstrates that it was not intimidated or pressured into returning a guilty verdict. After being painstakingly reinstructed, the reconstituted jury began deliberations

that lasted for ten days. See Pet. App. 9a, 37a. During the second round of deliberations, the jury asked for additional instructions that the original jury had not sought. *Id.* at 37a. Those are not the actions of a jury that has been pressured or intimidated into returning a verdict for the prosecution. Instead, they show that the jury was diligently and impartially fulfilling its duty.

While petitioners (Pet. 18) rely on press reports that jurors faced perjury investigations, they ignore the district court's finding that "there is no indication in the record that any jurors saw more than headlines in connection with this matter." C.A. App. 87. Nowhere in the transcript is there an indication that the jurors read press reports about possible investigations of the jurors themselves. Instead, the record reflects that the jurors were not aware of the press reports and had only tangential exposure to them. See *id.* at 525, 546, 551-552.

Petitioners state (Pet. 19) that the prosecutors offered to immunize the jurors. No discussion of immunity took place in front of jurors, however. In the course of in camera discussions about the questioning of jurors, the court asked the parties whether the jurors should be given any warnings regarding self-incrimination. Tr. 24,366, 24,385-24,389, 24,392, 24,402-24,403, 24,405-24,410, 24,412-24,414. The government responded that anything the jurors said would not be used against them. Tr. 24,500-24,501. Although the court told one juror (Gomilla) that nothing she said would be used against her, that warning was not repeated for other jurors, and the defense raised no objection. See Pet. 19; Tr. 24,502.[2]

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[2] While petitioners assert (Pet. 18) that at least three jurors retained attorneys, they did so *after* the verdict, when the defense filed motions and made statements in the media alleging juror misconduct and re-

3. Finally, petitioners contend (Pet. 22-28) that the court of appeals erroneously considered the effect of each alleged jury error in isolation rather than considering their cumulative effect. That contention is not properly presented here.

The court of appeals explained that it did not conduct a cumulative-error analysis because, in that court, petitioners did "not argue that the problems with the jury had a cumulative, prejudicial effect, even though they made this argument in their motion for a new trial before the district court." Pet. App. 3a. Because petitioners abandoned their cumulative-error challenge in the court of appeals, and that court did not address the challenge, it is not properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).[3]

Petitioners' contention (Pet. 22-23) that the court of appeals' decision is in conflict with decisions of this Court and other courts of appeals simply ignores the fact that the court of appeals did not consider the cumulative error question because petitioners had abandoned it. Cf. *United States* v. *Jawara*, 474 F.3d 565, 581 n.10 (9th Cir. 2007) (declining to conduct cumulative error analysis where the defense did not raise such a claim on appeal). The Seventh Circuit has conducted cumulative error review when the issue was properly preserved. *E.g.*, *United States* v. *Santos*, 201 F.3d 953 (2000). Indeed, petitioners cite *no* decision of *any* court of appeals declining to conduct cumulative-error review where, un-

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questing investigations of the jurors. See, *e.g.*, Losacco Mot. to File Amicus Curiae Br. 1-2.

[3] Petitioners note (Pet. 24) that their court of appeals brief referred to an "avalanche of errors." That phrase is not, however, equivalent to making a cumulative-error argument, especially considering that the court of appeals held there was only one error.

like here, that contention had been properly preserved and presented.[4]

Moreover, the district court and the court of appeals both determined that only one jury error occurred (the jury's consideration of the AJS material concerning the duty to deliberate). See Pet. App. 12a. With respect to *that* error, the court of appeals considered the totality of the jury's deliberations—including the substitution of jurors, subsequent re-commencement of deliberations, and supplemental jury instructions—in making its fact-bound harmlessness inquiry. See *id.* at 18a-22a. In an attempt to make out a predicate for a broader *cumulative error* claim, petitioners rely (Pet. 24-25) on allegations of error that are both unsupported by the record and contrary to the district court's factual findings and credibility determinations, which were affirmed by the court of appeals. For example, petitioners repeat their claim (Pet. 8; see Pet. 24) that there was an "astonishing effort" by the jurors to force out a "defense juror," when the district court found that there was no evidence to support such a claim. See C.A. App. 83-84, 646; p. 10, *supra*. Against that background, no colorable cumula-

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[4] Citing *United States* v. *Roach*, 502 F.3d 425 (2007), petition for cert. pending, No. 07-8277 (filed Dec. 10, 2007), petitioners argue (Pet. 22) that the Sixth Circuit also "refus[es] cumulative error review." In *Roach*, the court held that the defendants waived their claim of cumulative error because they argued it only perfunctorily on appeal. It also stated that the defendants had not demonstrated that the court committed "*any* error in the trial, much less that the cumulative effect of any such errors rendered the trial fundamentally unfair." 502 F.3d at 443 (internal quotation marks deleted). Like other courts, the Sixth Circuit has applied cumulative-error analysis in appropriate cases. See, *e.g.*, *United States* v. *Blackwell*, 459 F.3d 739, 770 (6th Cir. 2006) (internal quotation marks and citation omitted), cert. denied, 127 S. Ct. 1336 (2007).

tive-error argument exists, even if such a claim had been properly preserved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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